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Framing the Issues for Cameras in the Courtrooms: Redefining Judicial Dignity and Decorum

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This article examines the role of s. 2(b) of the Charter of Rights in determining the role of cameras in Canadian courtrooms. The discussions reveal that arguments in opposition to cameras are largely unfounded and in contradiction to the freedom of expression guarantee. The denial of the right is in reality based on judges' and lawyers' fear of loss of control of the courtroom environment. Cameras should only be banned from courtrooms as part of a total publication ban, and then only after a careful s. 1 analysis.

Cet article examine le rôle de l'al. 2(b) de la Charte canadienne des droits et libertés dans la détermination du rôle des caméras dans les salles d'audience des tribunaux canadiens. Les propos de l'auteur révèlent que les arguments contre la présence des caméras sont plus ou moins fondés et contreviennent à la liberté d'expression garantie par la Charte. En réalité, le refus de la présence des caméras est basé sur un sentiment d'appréhension de la part des juges et des avocats de perdre le contrôle des salles de tribunaux. La présence des caméras devrait être interdite uniquement dans le cadre des audiences tenues à huis clos, et ce, seulement après avoir procédé à une analyse rigoureuse de la situation, à la lumière des critères de l'art. 1. de la Charte.

Introduction

The question of whether or not to allow cameras in Canadian courtrooms has bedevilled the judicial system for some time. It is an issue upon which almost everyone has an opinion, be they judges, lawyers or members of the general public. Furthermore, opinions on this topic tend to be strongly held ones, especially among those who oppose the invasion of the electronic media into the inner sancta of the judicial system. There is assumed to be a conflict between the delivery of dispassionate justice with proper decorum and public access to courts through the eyes of the camera. An essential component of this article is the challenge to the presumed conflict between the dispensing of justice and camera coverage of court proceedings.

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Freedom of expression in Canada is recognized as one of the fundamental freedoms in a free and democratic society and is guaranteed in s. 2(b) of the *Charter*,[1] as follows:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

It should be noted that in the above formulation freedom of the press is included as one aspect of freedom of expression, and throughout this paper I shall refer to the larger concept of freedom of expression. While judges have generally been generous in interpreting the meaning of freedom of expression, the strength of that stance is often sorely put to the test when decisions must be made concerning electronic media in the legal sanctum of the courtroom.

Much of the debate among lawyers and judges regarding cameras in the courtroom has centred around the question "shall we or shall we not" allow such a thing. In this way, the legal profession has tended to view camera access as a privilege, and not as part of the rights guaranteed by s. 2(b) of the *Charter*. By framing the debate this way, a number of the conservative tendencies of the legal community are allowed to come into play. These include:

- regarding the courtroom as an exclusive judicial fiefdom;
- seeing lawyers and judges as the final arbiters and last protectors of dignity;
- viewing constitutional rights for the accused as automatically preemptive of other *Charter* rights;
- perpetuating a class bias against the electronic media and those who primarily receive their information through television; and
- questioning the integrity and ability of judges and lawyers themselves to handle publicity.

I would suggest that simply asking "shall we or shall we not" is not the appropriate way to tackle this issue. Instead, decisions should be exploring the meaning of freedom of expression, which is a fundamental freedom in this society and one that is now enshrined in the *Charter*. Access, as part of a constitutionally guaranteed right, should not exist simply at the discretion of the legal community. To the extent that a right of access is an essential part of this freedom, access of the electronic media to courtrooms is mandated. Once a right of access is seen as part

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

of freedom of expression, the legal community's task is one of balancing the right of access with other rights enjoyed in our society.

This article will explore three areas:

1) the jurisprudence regarding electronic media and courtrooms as part of a larger freedom of expression framework;
2) the appropriate test for use under s. 1 of the *Charter* when this right must be balanced with others, and some of the empirical evidence likely to be used in this regard in the future (This discussion will be restricted to the balancing of freedom of expression rights and fair trial rights, and will not consider in any detail the balancing of freedom of expression with any right to privacy.); and
3) what are perhaps the actual reasons behind the hesitation of the profession to admit cameras to courtrooms even when cameras' lack of impact on trial fairness is known to decision makers.

This article will not undertake to explore statutory publication bans and their application to the electronic media, which is a large issue unto itself.

I. *Electronic Media and Recent Freedom of Expression Jurisprudence*

The full scope of freedom of expression under s. 2(b) remains to be defined. Several years ago, one controversial issue was whether s.2(b) included a right of access at all. However, given some recent decisions, it is reasonable to expect that courts will now recognize access as part of s. 2(b). Some of these cases are discussed below. One important unresolved area is the extent to which s. 2(b) includes a right of access to courtrooms by the media—in particular the electronic media—and others. I would argue that s. 2(b) indeed includes such a right and that the task ahead for the Canadian judiciary is to decide how such a right of access interrelates with other rights and values in this society, and in particular other *Charter* rights. There is also the question of why the electronic media are treated differently from other branches of the free press.

1. *Electronic Access to Courtrooms and s. 2(b)*

Whether a right of access is an essential part of s. 2(b) has been examined by the Supreme Court of Canada in *Committee for the Commonwealth of Canada* v. *Canada*.[2] While this case makes it clear that some right of

2. [1991] 1 S.C.R. 139.

access is part of s. 2(b), the Court was very divided in its analytical approach: seven justices sat on the case and there were six different analyses. In March of 1984 two men went to Dorval Airport in Montreal to promote knowledge of their group by handing out pamphlets and magazines. An RCMP officer requested they cease their activities. They were then informed by the assistant airport manager that their activities were prohibited by the *Government Airport Concession Operation Regulations*,[3] which prohibited any solicitation or advertising in the airport. The men brought an action in the Federal Court, seeking an order that, *inter alia*, their right to freedom of expression had been violated. The trial judge agreed. The Federal Court of Appeal, in a 2–1 decision, dismissed the appeal.[4] However, the Court did not rule on whether airports constituted a public forum for the purposes of freedom of expression under the *Charter*.

The Supreme Court of Canada dismissed an appeal from the Federal Court of Appeal's decision. Justices Lamer and Sopinka held that ownership by the government cannot of itself authorize an infringement of the freedom guaranteed by s. 2(b) of the *Charter*. When a person claims that freedom of expression has been infringed in a place owned by the government, the interests at issue must be examined. An individual will only be free to communicate in such a place if the form of expression used is compatible with the principal function or intended purpose of the place and does not have the effect of depriving citizens, as a whole, of the effective operation of government services. If the expression contravenes the function of the place, such expression is not covered under s. 2(b).

Justice L'Heureux-Dubé preferred to limit such qualifications to the analysis under s. 1. She cited the necessity in interpreting such a fundamental freedom as freedom of expression of using a large and liberal approach to defining the scope of s. 2(b). Further, applying the test from *Irwin Toy*[5] she states:

> If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches on the guarantee.[6]

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3. SOR/79-373, s. 7(a), (b).
4. [1987] 2 F.C. 68.
5. *Irwin Toy Ltd.* v. *Quebec (Attorney-General)*, [1989] 1 S.C.R. 927.
6. *Supra* note 2 at 187.

"Restricting a form of expression tied to content" would seem to apply to the situation of excluding the electronic media from courtrooms, thus producing an infringement of s. 2(b).

But L'Heureux-Dubé J. also refused to consider arguments surrounding the rights of the media or more general issues of access to public property:

> For our present purposes, it is only necessary to consider the *Charter*'s impact on the distribution of leaflets on *government* property. The *Charter*'s effect on leafletting on private property, as well as whether it gives the media a right of access to public property for the purpose of gathering news, are better left for another day. It would be inappropriate to address these issues here. . . .[7]

The effect of *Committee for the Commonwealth* was summarized in simple terms by Justice Krever in his majority judgment in *Ramsden* v. *Peterborough (City)*:

> I read *Committee* . . . as holding that, although s. 2(b) does not confer a right to use all government property for expressive purposes, prohibiting expression at, in or on all public property does offend s. 2(b). It is also authority for the proposition that the government's stewardship or even ownership of public property does not entitle the government to prohibit absolutely access to all public property for the purpose of communicating information.[8]

An approach to limiting s. 2(b) has been adopted which involves looking at the principal purposes of a government-owned place, and deciding whether or not the expression is compatible with that purpose. For example, protesting in the middle of the highway is given as an example of unprotected expression.

The compatible-with-principal-purpose test is an interesting one when applied to cameras in the courtroom. What are the purposes and functions of a courtroom? One of those purposes is to provide a forum for the public surveillance and discussion of the judicial process. This purpose is quite different from purposes such as landing airplanes, testing weapons, or docking ships. When one of the very purposes of a government-owned place is to provide an avenue for freedom of expression, I would suggest it becomes difficult if not impossible to limit the rights of electronic media establishments at the s. 2(b) stage, under a compatible-with-the-principal-purpose test.

In the earliest case considering the electronic media and the scope of s. 2(b) as it applies to the courtroom, freedom of the press was limited

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7. *Ibid.* at 197 [emphasis in original].
8. (1991), 5 O.R. (3d) 289; aff'd [1993] 2 S.C.R. 1084 at 292 [emphasis in original].

simply to a right to attend and report generally. In 1983 in *R.* v. *Thomson Newspapers*,[9] Anderson J. of the Ontario High Court refused to allow the filming of documentary evidence. This would have required court staff to produce documents a second time for inspection, and the court held that there is no requirement under s. 2(b) for the court to make evidence available to certain reporters in a certain way. This approach is consistent with rulings that the media's right to courtroom access is no greater than the general public's.[10] Under this approach, there is no obligation to make evidence available in a way that suits broadcast needs.[11]

The filming of documentary evidence is usually of less concern to the media than the filming of actual proceedings and of the parties involved. Section 2(b) in the context of the filming of witnesses and the accused was not considered until the case of *R.* v. *Squires*.[12] On this issue the ultimate deciding court in *Squires* is all over the map on the proper way to analyze the problems, with the Ontario Court of Appeal offering three rather different opinions and one dissent. This case dealt with s. 67 of the *Judicature Act*,[13] which made it an offence to direct the filming of a person

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9. (1983), 11 W.C.B. 436 (Ont. H.C.).

10. See *Re Southam Inc. and R (No.1)*(1983), 3 C.C.C. (3d) 515 (Ont. C.A.); *R.* v. *R.(T.) (No.1)* (1984), 7 D.L.R. (4th) 205 (Alta. Q.B.); but also *R.* v. *Lortie* (1985), 21 C.C.C. (3d) 436 (Que. C.A.), where a majority of the Quebec Court of Appeal denied certain media organizations access to videotape evidence showing the accused allegedly committing the acts of which he was accused. Significantly, in light of her appointment to the Supreme Court of Canada, then Court of Appeal Justice L'Heureux-Dubé held in dissent that the media did indeed have a right to access the video footage, as part of their general s. 2(b) rights.

11. One might make the case that the electronic media are in the same position as a disabled member of the public *vis-à-vis* inspecting documents. To the extent that accommodations might be made for a blind person, for example, one might argue that evidence must be presented in a way that is useful to electronic media establishments. This, however, is approaching an analogy between the electronic media and groups protected from discrimination under the *Charter*, which is no longer a legal possibility given the Supreme Court's current definition of the types of groups which are analogous to those explicitly protected. (See *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143; *R.* v. *Turpin*, [1989] 1 S.C.R. 1296.)

12. (1986), 25 C.C.C. (3d) 44 (Ont. Prov. Ct.), aff'd (1989), 69 C.R. (3d) 337 (Ont. Dist. Ct.); (1992), 11 O.R. (3d) 385 (C.A.); leave to appeal refused, [1993] 3 S.C.R. ix.

13. R.S.O. 1980, c. 223. This section (now superseded by the similar s. 146 of the *Courts of Justice Act*, S.O. 1984, c. 11) provides that:

> 67.(1) In this section,
>
> (a) "judge" means the person residing at a judicial proceeding;
>
> (b) "judicial proceeding" means the space enclosed by the walls of the building.
>
> (2) Subject to subsection (3), no person shall,
>
> (a) take or attempt to take any photograph, motion picture or other record capable of producing visual representations by electronic means or otherwise.
>
> (i) at a judicial proceeding, or
>
> (ii) of any person entering or leaving the room in which the judicial proceeding is to be or has been convened, or

entering or leaving a courtroom (as well as filming within courtrooms). The defendant, a television reporter, was charged under this section and in a pre-trial motion argued that s. 67 was inconsistent with s. 2(b) of the *Charter*.

In the Ontario Provincial Court, the trial judge rejected this argument, and found the defendant guilty. On appeal to the District Court, Justice Mercier found that s. 2(b) of the *Charter* was contravened by s. 67 of the *Judicature Act*. He held, contrary to the trial judge, that s. 2(b) of the *Charter* conferred a right to televise or photograph judicial proceedings in court:

> To say that you cannot be limited in the dissemination of information . . . but that you can be limited in gathering the information you wish to disseminate, or at least in the manner of gathering that information . . . renders that right meaningless.[14]

This is a significant affirmation of the electronic media's s. 2(b) rights in real world terms. However, this right did not fare well under Justice Mercier's approach to balancing rights under s. 1 of the *Charter*. He found that the provisions of s. 67, with the exception of s. 67(3)(c), were saved by s. 1.

> [T]he guaranteed right to a fair trial is paramount to the fundamental freedom of the press and other media of communication, certainly within the confines of a court and probably anywhere. This paramount right, therefore, justifies some limitation of any other freedom which might affect it negatively. The government objective to ensure fair trials is of sufficient importance to warrant overriding the constitutionally protected freedom of the press and other media of communication if it established that it can interfere with that objective. . . .
>
> The evidence does establish that televising judicial proceedings can and does interfere with fair trials.[15]

(iii) of any person in the precincts of the building in which the judicial proceeding is to be or has been convened where there is reasonable ground for believing that such person is there for the purpose of attending or leaving the proceeding; or

(b) publish, broadcast, reproduce or otherwise disseminate any photograph, motion picture or record taken or made in contravention of clause (a).

(3) Subsection (2) does not apply to any photograph, motion picture or record taken or made upon authorization of the judge,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the judicial proceeding;

(b) in connection with any investive, ceremonial, naturalization or similar proceedings; or

(c) with the consent of the parties and witnesses, for such educational or instructional purposes as may be approved by the judge.

(4) Every person who is in contravention of this section is guilty of an offence . . . .

14. *Supra* note 12 at 347–48.
15. *Ibid.* at 352–53.

Justice Mercier is demonstrating the pre-eminent concern of many judges for a fair trial and the rights of the accused in the criminal process. The effect of his decision was that s. 67 remained in force, with a revised subsection 3,[16] allowing a judge to permit filming if the parties and witnesses agree to the procedure for any purpose, not only for educational or institutional activities.

The subsequent decision of the Ontario Court of Appeal was not as helpful as one might have hoped. At the outset the court limited the scope of the appeal to s. 67(2)(a)(ii), and refused to consider the entire section as the courts below had done. Thus, any discussion regarding cameras in the courtroom proper was effectively curtailed, shedding no new light on actual courtroom access. The Court dealt only with filming a person entering or leaving a courtroom. This is a relatively narrow issue, and there were a variety of opinions: three majority opinions and one in dissent.

In dismissing the appeal, the Court held that s. 67(2)(a)(ii) did indeed infringe s. 2(b) of the *Charter*, as the freedom of expression enjoyed by television journalists is the freedom to film events as they occur and broadcast them to the public. The court held s. 67(2)(a)(ii) restricted this freedom. In his dissenting judgment, Tarnopolsky, J.A. alluded to his impressions of televising trials:

> Without commenting upon the desirability of televising trials, since that issue is not before us, I would agree that a certain amount is lost to journalists and the public because of the limits imposed by s. 67(2) of the *Judicature Act*. An artist's rendering can never capture the vital and spontaneous depiction offered by televised images. . . .
>
> There is ample evidence in this case to suggest that television journalism, perhaps the most widely resorted to medium of journalism today, is handicapped in the coverage it can convey of judicial proceedings, thereby precluding any meaningful realization of its potential in informing the public and of its s. 2(b) right.[17]

As at the previous level, however, it was also found that such restrictions were a reasonable limit under s. 1 of the *Charter*.

In applying the second part of the *Oakes*[18] test, there was held to be a rational connection between the restrictions in s. 67(2)(a)(ii) and the objective of the legislation—preserving a calm and dignified atmosphere

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16. Of course, the right to a fair trial and the right of media access are not always at cross purposes, as evidenced by the request for media access by Paul Bernardo's lawyer in Canada's own sensational Homolka trial. This view has now been affirmed by the Supreme Court of Canada in *Dagenais*, discussed below at note 34.
17. *Supra* note 12, (1992), 11 O.R. (3d) 385 (C.A.) at 405.
18. *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

for the administration of justice. While refusing to address the issue of cameras in the courtroom specifically, and speaking in *dicta*, Houlden, J.A. discussed the atmosphere of a courtroom:

> A courthouse is not a place of entertainment or education; it is a place where people come to obtain a just resolution of their disputes. . . .
>
> The other objective of the legislation . . . was the protection of privacy of the participants involved. . . .
>
> [These] two objectives, I have accepted, are of sufficient importance, in my judgment, to justify overriding the freedom conferred on the appellant by s. 2(b) of the *Charter*.[19]

Leave to appeal this decision to the Supreme Court of Canada was refused.

2. *Inclusion Within s. 2(b): The Close Connection Between Freedom of Expression and Electronic Access to Courtrooms*

Section 1 is the appropriate place for balancing in the case of cameras in the courtroom. Applying s. 2(b) liberally renders unlikely the exclusion from its scope of camera access to courtrooms. In this context the balancing of other rights and interests is best done using the detailed framework set out in s. 1, rather than unnecessarily narrowing s. 2(b).

I have argued elsewhere that certain types of speech should be excluded from the scope of s. 2(b) to save the effort of going through a s. 1 balancing every time the government regulates speech.[20] These areas would include hate literature and degrading obscenity. In those cases the impact of equality rights in the *Charter* should be to remove from the scope of s. 2(b) types of speech that are damaging to vulnerable groups to the extent that it treats them unequally.

The case of cameras in the courtroom is very different from those examples. The right of access for the electronic media is an integral part of freedom of the press that is protected under s. 2(b). It is not just another "type" of expression based on content. Access as part of freedom of the press is crucial to the manifestation of freedom of expression in Canadian society. Therefore it is appropriate to limit media access using the more demanding technique of proving an exception under s. 1 of the *Charter*.

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19. *Supra* note 12 at 393.

20. I refer to this "mutual modification" of equality rights and freedom of expression in the forthcoming article "Regulating Freedom of Expression the Canadian Way" published as part of the proceedings of "Continuing Constitutional Dilemmas" held by the Queen's University Institute of Intergovernmental Affairs in 1994. The idea is that freedom of expression can be "read down" to take account of the *Charter* guarantees of equality. Presumably the process could also work in reverse—restricting equality to take account of the guarantee of freedom of expression.

Not everyone agrees that access to courtrooms by electronic media should be considered a s. 2(b) *Charter* right. David Lepofsky explores what he describes as serious threats to the proper administration of justice posed by cameras in the courts and confronts the arguments in favour of access for the electronic media advanced by advocates of freedom of the press.[21] Lepofsky argues that the principle of open justice does not require camera access to courts. Indeed, he concludes that cameras should only be allowed into courtrooms with the consent of the parties. More pertinently here, Lepofsky maintains that camera access to the courtrooms is not a part of the guarantee of freedom of expression in s. 2(b) of the *Charter*. This conclusion leaves the matter of camera access to courts as a mere policy debate unburdened by the rigours of constitutional analysis. In essence Lepofsky argues that because cameras have traditionally not been allowed in courtrooms, there is no constitutional right of access as part of freedom of the press.

> Constitutional rights tend to include those entitlements that we consider fundamental to our democracy. They are comprised of entitlements that are tried and true.[22]

This analysis comes dangerously close to constitutionalizing the status quo rather than recognizing the value of the *Charter* as a vehicle for change. Freedom of the press is fundamental to our democracy and this in our modern technological age includes the electronic media. Just because certain claims take a new form and make some uncomfortable does not mean they are any less deserving of constitutional protection. Inequality has long been practiced in Canada and from the perspective of some is tried and true. Surely that does not mean that more novel concepts of equality (albeit not tried and true) cannot be guaranteed by s. 15 of the *Charter*. I reject Lepofsky's constitutional analysis as too backward looking, and advocate a more transformative role for the *Charter* in Canadian society.

The connection between freedom of expression and access to the courts can be seen in the Supreme Court of Canada's confirmation of the Ontario High Court's decision in the *Edmonton Journal* case.[23] Section 30 of the Alberta *Judicature Act*[24] prohibited, *inter alia*, the publication of any details relating to matrimonial proceedings other than the names, addresses and occupations of the parties and witnesses; a concise statement

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21. M. David Lepofsky, "Cameras in the Courtroom—Not Without My Consent" (1996) 6 Nat. J. Const. Law 161.
22. *Ibid.* at 218–19.
23. *Edmonton Journal* v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.
24. *Supra* note 13.

of the charges, defences, counter-charges and legal submissions; and the summing up of the judge. The Edmonton Journal sought a declaration that s. 30 of the *Judicature Act* contravened ss. 2(b) and 15 of the *Charter*. Both the Court of Queen's Bench and the Court of Appeal dismissed the application on the ground that s. 30 constituted a reasonable limit to s. 2(b) under s. 1 of the *Charter* and that s. 15 was not violated. The Supreme Court of Canada allowed the appeal, holding that s. 30 violated s. 2(b) of the *Charter* and was not a reasonable limit under s. 1 of the *Charter*.

Throughout the Court's decision, there are many instances where the importance of having access to the courts is stressed. For example, Cory J. opined:

> [M]embers of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. . . . It is only through the press that most individuals can really learn of what is transpiring in the courts. . . . Practically speaking, this information can only be obtained from newspapers or other media.[25]

He also wrote:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. . . . The vital importance of the concept cannot be overemphasized.[26]

While this case did not deal with cameras in the courtroom, the underlying message of Cory J.'s opinion is that access to the courts for the media is of fundamental importance to freedom of expression. This sentiment should apply to the electronic as well as the print media.

Closely analogous to the cameras in the courtroom question is that of cameras in the legislatures. The Supreme Court considered this issue in *New Brunswick Broadcasting* v. *Nova Scotia (Speaker of the House of Assembly)*.[27] An action was brought by a local television station against the Speaker of the House of Assembly in Nova Scotia, arguing that s. 2(b) of the *Charter* guaranteed it the right to film the proceedings of the House. The Supreme Court of Canada ruled that the *Charter* did not apply to members of the House when exercising their inherent privileges, since such privileges enjoy constitutional status. Consequently, the decision does not specifically address the issue of a constitutional right of access to legislative proceedings. However, the Court manages again, as in *Committee for the Commonwealth*, to take several different approaches

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25. *Supra* note 23 at 1339–40.
26. *Ibid.* at 1336.
27. [1993] 1 S.C.R. 319; rev'g (1991), 80 D.L.R. (4th) 11 (N.S.S.C.,A.D.).

in discussing access as part of s. 2(b). McLachlin J., in addressing the issue of privilege, offered these thoughts:

> In Canada, this court has ruled that legislative assemblies are not open to the public as of right: see *Payson* v. *Hubert* (1904), 34 S.C.R. 400. . . .
>
> However . . . in the Canadian context of 1992, is the right to exclude strangers necessary to the functioning of our legislative bodies?
>
> In my view, this privilege is as necessary to modern Canadian democracy as it has been to democracies here and elsewhere in past centuries. . . . [T]he Assembly must have the right, if it is to function effectively, to exclude strangers.[28]

McLachlin J.'s opinion concludes that the Legislative Assembly of Nova Scotia possesses an inherent constitutional right to exclude strangers from its chamber. One might question whether the press should be considered a "stranger" to a legislative chamber but the Court seemed unconcerned on this point.

Justice Sopinka disposed of the appeal on different grounds, holding that the *Charter* applied to members of the House of Assembly and that refusing media access to the public gallery contravened s. 2(b) of the *Charter*. However, he held that such a restriction was a reasonable limit under s. 1. It was justified primarily on the existence of the electronic Hansard which focused only on members speaking. That is, given the importance of decorum in the House, the prohibition of individual hand-held cameras was not out of proportion to the decorum objective.[29] In dissent Cory J. stated:

> Informed public opinion is the essential bedrock of a successful democratic government. Accurate information can only be obtained by the public through the work of a responsible press which must today include television coverage.[30] . . .
>
> In my view, the protection of news gathering does not constitute a preferential treatment of an elite or entrenched group, the media, rather it constitutes an ancillary right, essential for the meaningful exercise of the *Charter*.[31] . . .
>
> So long as the camera is neither too pervasive nor too obtrusive, there can be no good reason for excluding it.[32]

Adopting either Cory J.'s or Sopinka J.'s reasoning in this case, we are left with the inclusion of media access as essential to a meaningful s. 2(b) right. The courts will require a good reason to successfully exclude the electronic media.

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28. *Ibid.* at 386–87.
29. *Ibid.* at 397.
30. *Ibid.* at 403.
31. *Ibid.* at 406.
32. *Ibid.* at 409.

Cameras in the courtroom are grudgingly being legally recognized as a means to realizing s. 2(b) rights.[33] There seems, however, to be a split among the judiciary in the cases above when it came to balancing other rights against freedom of expression (which will necessarily impact on the freedom accorded to the electronic media). This debate regarding s. 1 re-emerged in the Supreme Court when considering the rules regarding general publication bans in *Dagenais* v. *CBC*.[34]

3. *Fair Trials, s. 1 Balancing and Freedom of Expression.*

Encouragingly for those regarding freedom of expression as being as fundamental to Canadian society as the right to a fair trial, and as not necessarily in conflict with that right, the majority in *Dagenais* held that these rights must be balanced under s. 1 in a more sophisticated way than had previously been done. The Supreme Court also concluded that the right to a fair trial did not automatically trump rights to freedom of expression. Although there were strong dissents to the majority decision, the majority was unified in its analytical approach to s. 2(b) in a way that has not been present in other cases deciding media/courtroom issues. The opinion of Lamer C.J. was supported by Sopinka, Cory, Iacobucci and Major JJ.

In *Dagenais*, this majority modified the appropriate test for publication bans. Lamer C.J. stated:

> I am . . . of the view that it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the *Charter*. Given that publication bans, by their very definition, curtail the freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected *Charter* rights. The modified rule may be stated as follows:

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33. Unfortunately, there has been no definitive statement from the Supreme Court on courtroom access, even for ordinary members of the public, let alone for electronic media reporters and their equipment. (See discussion in M.D. Lepofsky, "Open Justice 1990" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (Carswell, 1991) at 15–21. Lepofsky, *supra* note 21 also features an appraisal of the American experience with camaras in courtrooms that differs from the one I present here.) However, given that a meaningful right to freedom of the press has been held to include the right to gather and broadcast events as they unfold, I would suggest that finding s. 2(b) protection is not an onerous conceptual leap. Rather, given the appreciation of s. 2(b) rights in Supreme Court decisions such as *Dagenais* (discussed below at note 34) and *Edmonton Journal*, combined with the government-access framework set out in *The Committee for the Commonwealth*, cameras in the courtroom should not be difficult to explicitly include as part of meaningful freedom of the press, when the issue comes before the Supreme Court.

34. [1994] 3 S.C.R. 835.

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[35]

This modified test reflects three important analytical changes in the approach to balancing freedom of expression with other *Charter* rights, such as those found in s. 11(d).

First, it is the first time the court explicitly accords equal status to ss. 2(b) and 11(d). Lamer C.J. writes:

> The pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and in particular the equal status given by the *Charter* to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.[36]

The affirmation of a lack of hierarchy is a significant development in the balancing of potentially competing *Charter* rights. It is also a particularly significant holding if applied in cases of electronic broadcasts of courtroom events. This is because of the past ease with which s. 1 justifications for restrictions have been found when fair trial rights are even speculatively affected by the electronic media's freedom of expression rights. Such easy restrictions can no longer be the norm.

Further increasing the weight of freedom of expression rights in the s. 1 balance will be the additional proportionality test requirements clarified in *Dagenais*. These new requirements were developed in the context of the reformulated test for the issuance of publication bans. The new test affirms a refinement of the proportionality test to be used in satisfying s. 1 requirements:

> While the third step of the *Oakes* proportionality test has often been expressed in terms of the proportionality of the objective to the deleterious effects, this Court has recognized that in appropriate cases it is necessary to measure the actual salutary effects of the impugned legislation, rather than merely considering the proportionality of the objective itself. . . .

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35. *Ibid.* at 878 [emphasis in original].
36. *Ibid.* at 877.

> In my view, characterizing the third part of the second branch of the *Oakes* test as being concerned solely with the balance between the objective and the deleterious effects of a measure rests on too narrow a conception of proportionality. I believe that even if an objective is of sufficient importance, the first two elements of the proportionality test are satisfied and the deleterious effects are proportional to the objectives, it is still possible that, because of a lack of proportionality between the deleterious effects and the salutary effects, a measure will not be reasonable and demonstrably justified in a free and democratic society. I would therefore rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights and freedoms in question and the objective, *and there must be a proportionality between the deleterious and salutary effects of the measures.*
>
> A similar view of proportionality must inform the common law rule governing the publication bans. . . . This suggests that when a ban has a serious deleterious effect on freedom of expression and has few salutary effects on the fairness of a trial the ban will not be authorized at common law.[37]

Thirdly, the *Dagenais* majority rejects the "clash model" applied to freedom of expression and the fair trial process. Rather, the Court sees these rights as interwoven in a more complex way in Canadian society. Both restriction and openness are described in *Dagenais* as potentially having both negative and positive effects on trial fairness. This approach, arguably, will prove of benefit to the courtroom-related rights of the electronic media. Heretofore courts have tended to conform to the clash model to the detriment of freedom of expression and have been readily accepting of negative speculation regarding the presence of cameras and their impact on a fair trial. This has led to an easy use of s. 1 to justify restricting camera access.

It is extremely significant that the Supreme Court of Canada in *Dagenais* rejects the "clash of values model" in which it is assumed that freedom of the press, in the form of camera access to the courtrooms, will interfere with the fairness of the trial process. This past approach has encouraged a confrontation between the electronic media and judicial officials, rather than an attempt to collaborate on creating a fair but open judicial process.[38]

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37. *Ibid.* at 888–89 [emphasis in original].

38. W. MacKay, "Courts, Cameras and Fair Trials: Confrontation or Collaboration" (1985) 8 Prov. Judges J. 7. This is a position that I advanced in the foregoing article on this topic and I am delighted that the Supreme Court of Canada has added its weight to my academic musings. Needless to say, the Supreme Court adopted this position in *Dagenais* not because I advanced it in some obscure article, but because it thought that the analysis was solid.

What impact will *Dagenais* have on restrictions on electronic media as opposed to blanket publication bans? I would suggest that the strong affirmation in *Dagenais* of the significance of s. 2(b) rights for Canadian society should mean that whenever a decision has to be made about barring camera access, a s. 1 balancing is in order. The new, more sophisticated test for the issuance of a publication ban is the appropriate mechanism to evaluate electronic media presence in courtrooms, which after all, is just another form of publication.

The first judicial consideration of courtroom camera access subsequent to *Dagenais* sends some mixed messages about the appropriate conceptual framework for making decisions regarding electronic access. In *R.* v. *MacDonnell*,[39] Bateman J.A. of the Nova Scotia Court of Appeal made the first decision on camera access, in the face of objection by an accused, under that court's "cameras in the courtroom" pilot project. It is encouraging that camera access is ultimately allowed by Bateman J.A.'s order. The existence of the pilot project at all is encouraging as it is an important groundbreaker.[40] However, the decision, while using *Dagenais* as a general reference point, never explicitly treats camera access as a s. 2(b) issue. Instead of relying on a s. 1 balancing, the decision resorts to the administrative guidelines set out under the pilot project. This puts the decision much more in the "shall we or shall we not" realm of judicially-granted privilege, rather than squarely in the area of rights balancing.[41]

In *MacDonnell*, a television station applied under the pilot project for an order permitting coverage of a Crown appeal of a stay of proceedings

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39. (1996), 147 N.S.R. (2d) 302 (C.A.) [hereinafter *MacDonnell*].

40. The Chief Justice of Nova Scotia, Lorne Clarke, has remarked: "I got the impression generally speaking that people are genuinely interested in knowing how the process operates [but] it's not possible for people to attend courts as observers because of work commitments and family responsibilities." (quoted by N. Cunningham, in "Lights, Camera, Action" (1995) 11 Justice Rep. 18. The Court of Appeal deserves praise for recognizing this situation and attempting to address it by opening access to the media establishments most accessible to the majority of people: television news broadcasters.

It is widely recognized that appellate proceedings may be acceptably filmed. This was the clear conclusion of the C.B.A. Special Committee on Cameras in the Courtroom. Seemingly, the higher the level of court the less resistance there is to actually being filmed. The Supreme Court of Canada is the most notable example of permitting cameras into the courtroom. A pilot project is currently under way, through which media outlets can apply to the Court for permission to broadcast its proceedings. The Court reviews the content of the case and consults the parties to the action. This has resulted in the televising of a number of high profile cases on the Parliamentary channel.

41. Indeed, the current policy of the Nova Scotia Supreme Court is that cameras are not allowed in courtrooms with the exception of those media establishments which have the approval of the presiding judge to film appeal court proceedings under the pilot project's application procedure. This policy implies that camera access is not a s. 2(b) right at all, but merely a privilege granted by particular judges in their courtrooms.

in a case concerning the death of a young boy. The accused filed a notice of objection, as provided for by the pilot project's guidelines. The objection was largely based on the potential prejudice resulting from the contamination of a large pool of jurors by television coverage (as was the issue in *Dagenais*).

In granting the order permitting coverage, Bateman J.A. relied on Pilot Project Rule and Guideline 9:

> 9. Television and other media coverage of proceedings of the Court of Appeal shall be deemed to be in the public interest. It shall be grounds for refusal of an order permitting coverage if the prejudice, disadvantage, hardship, or other valid reason apprehended by a party resulting from coverage of the appeal or application outweighs the interest of the public in the granting of the order, or if media coverage of the proceedings to which the application applies is shown not to be in the public interest.

After a consideration of *Dagenais*, Bateman J.A. states:

> The onus is on the party opposed to the proceeding to satisfy me that the coverage sought is not in the public interest, or, that the "prejudice, disadvantage, hardship, or other valid reason apprehended by a party resulting from coverage of the appeal or application outweighs the interest of the public in the granting of the order".[42]

Basing such a decision on a deemed "public interest" in television coverage is a step forward, but it is not the same as recognizing television newsgathering and broadcasting as an essential part of s. 2(b). Further, the definition of "public interest" is not clear: which public, and what types of interests are of concern here?

Despite some problems, Bateman J.A. makes other statements which are promising for their tendency to place television bans in the same category as general publication bans:

> There has been no request, here, for a general publication ban. This proceeding will be open to the public. The question before me is whether *additional publicity* created by television broadcast of all or part of this appeal will occasion prejudice, disadvantage, or hardship which outweighs the public interest.[43]
>
> . . .
>
> [T]here is a possibility that the Court of Appeal will order a new trial. The appeal proceedings are, nevertheless, open to the general public. Absent a ban on publication, particulars of the evidence at the first trial may be published. If a new trial is ordered the accused is in a similar position to Ms. MacDonnell. Counsel for Ms. MacDonnell submits that the distinguishing feature, here, is the interest that this case may generate. However, any appeal gauged to be of interest to the public will attract publicity. This

42. *Supra* note 39 at 307.
43. *Ibid.* [emphasis in original].

> pilot project simply provides for an additional *form* of publication. To routinely deny television coverage in such cases would seriously undermine the premise of this project.[44]

In the second decision arising out of Nova Scotia's pilot project, Bateman J.A. refused to allow television coverage in the courtroom. The issue in *Ryan* v. *Skoke*[45] involved an appeal from an order mandating an unwed father's access to his child. The appellants included the custodial grandmother, Member of Parliament Roseanne Skoke, who has attracted national attention for her opposition to the rights of gay men and lesbians in the name of "family values." The media were keenly interested in any airing of her personal family activities. The Canadian Broadcasting Company sought authority to broadcast Ms. Skoke's appeal from the child access order, which promised to be particularly interesting as she was representing herself and the other appellant, her daughter.

The appellants objected to the CBC's application, while the respondents took no position. The appellants based their objection largely on the overriding consideration in all family law proceedings that the best interests of any child involved are paramount. They argued that the broadcast of the facts of this case would indeed not be in this child's best interests. They connected this argument to Pilot Project Rule and Guideline 9, whereby the presiding justice may deny television access where there is "prejudice, disadvantage" and "unnecessary hardship" caused.

Counsel for the CBC cited the following passage from the Supreme Court of Canada's decision in *A.G.N.S.* v. *McIntyre*, in support of their application for coverage:

> Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of individuals involved are no basis for exclusion of the public from judicial proceedings.[46]

Again, as in *MacDonnell*, Bateman J.A. bases her decision on the guidelines of the pilot project itself and avoids any detailed balancing of rights using s. 1 of the *Charter*. She points to the history and nature of family court proceedings in support of the limitation of publicity in the interests of the children involved. In holding against the CBC's application Bateman J.A. states:

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44. *Ibid.* at 305 [emphasis in original].
45. (1996), 148 N.S.R. (2d) 222 (C.A.) [hereinafter *Skoke*].
46. *A.G.N.S.* v. *McIntyre* (1982), 49 N.S.R. (2d) 609 (S.C.C.) at 618.

> It is essential, for the sake of the child, that there has been an opportunity to interact without unnecessary intrusion into their personal affairs. I agree with the submission of the appellant that the prospect of television broadcast of the appeal proceeding can only add stress to an already strained relationship. To create additional stress for the parents and grandparents cannot impact positively on the child. In my view, it is appropriate, in this application, to be guided by the provisions of the *Family Court Act* which are directed at respecting the privacy of parties. The sound policy reasons which underpin section *10(2)* and *(3)* of the *Act* are equally applicable at all stages of the proceeding.[47]

This approach is in keeping with that laid down by Wilson J. in *Edmonton Journal*. There, she applied a contextual approach to balancing freedom of expression rights with the public interest in protecting the privacy of litigants in matrimonial cases. She stated:

> It may be, for example, that freedom of expression has greater value in a political context that it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.[48]

While I agree with Bateman J.A. that the best interests of the child in a family law case may call for the exclusion of cameras from the courtroom, any such conclusion should be based on a constitutional s. 1 balancing, using the approach recently approved by the Supreme Court in *Dagenais*. Here, Bateman J.A. is again basing her decision on internal administrative guidelines as if they were law. Instead of a *Dagenais*-type evaluation of the salutary and negative effects of a television ban, Bateman J.A. merely states that the "appellants have shown particular circumstances here that outweigh the public interest",[49] without listing the circumstances or describing the public's interest.

This approach contains the implicit assumption that television bans do not raise real freedom of expression issues. The ban is put in place as merely part of the judge's prerogative in controlling the courtroom. Television exclusion is treated as being so different from a general publication ban that it does not warrant the full balancing that I argue is necessary. Bateman J.A. rejects *McIntyre* as support for the CBC's position that the appellants here were not requesting a full publication ban. This approach is discouraging for those who would like to see

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47. *Supra* note 45 at 227.
48. *Supra* note 23 at 1355–56.
49. *Supra* note 45 at 227.

television access taken seriously as part of Canadians' rights under s. 2(b) of the *Charter*. It is also inconsistent with Bateman J.A.'s citing of the *Dagenais* publication ban framework in her previous decision under the pilot project in *MacDonnell*.

Not only does the exclusive reliance on the Pilot Project Guidelines fail to accord camera access to the courtrooms its proper constitutional status under s. 2(b) of the *Charter*, it also affects the justification process. In order to ban camera access it is only necessary for the opposing party to successfully argue one of the restrictions on access in the guidelines. This is a much less demanding task than demonstrably justifying the reasonableness of the limit on camera access as part of a regular s. 1 *Charter* justification. Only this latter constitutional analysis gives proper recognition to limits being placed on a fundamental constitutional value, rather than a privilege to be granted or denied by the presiding judge.

The result in *Skoke* should have been reached with more evidentiary as well as constitutional rigour. Bateman J.A. accepts the appellants' assertion that televised coverage of the proceedings will reach a much wider audience than would be reached through the usual means of publication. However, no empirical evidence is cited to support the idea that a televised news story including images of actual proceedings will attract a greater audience than televised coverage would otherwise, or that it would cause more harm to the child than the reporting of the facts by a news anchor. This is another instance of a court being willing to jump to conclusions about television and its impact.

Perhaps what this decision really revolves around is the additional exposure that the grandchild of a controversial MP is subject to, and the judicial distaste for the inevitable public curiosity and media enthusiasm. Television is usually considered by the courts to be the worst purveyor of this kind of sensationalism. Bateman J.A. closed her judgment with the following remarks:

> There has not been a request of this Court for a publication ban. Subject to any further order which may be made, the appeal is a public proceeding. The applicant and appellants acknowledge that there has already been publicity about this case. No doubt there will be more publicity. I recognize that, even without filming, the publicity will not, by law, be limited to the "substantive legal issues" and thus may well venture into the personal circumstances of these families. I can only hope that the media will be sensitive in this regard and permit these parties some privacy and dignity, in the interests of this child's future.[50]

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50. *Supra* note 45 at 227–28.

Given Bateman J.A.'s recognition of the important yet ordinary role of television coverage in conveying news to the public, perhaps operating within the somewhat detailed administrative structure created for the pilot project allows her to feel she can skip a s. 1 analysis. Under the structure of the pilot project, she was answering objections to coverage, not a s. 2(b) *Charter* challenge by the media for access. The effect of the pilot project should not be to pre-empt a proper *Charter* analysis.

II. *The Shape of s. 1 Balancings to Come*

If other courts across Canada institute similar projects, it seems inevitable that a direct s. 2(b) *Charter* challenge will emerge when a future decision under such an administrative scheme goes against a television reporter. This will necessitate a s. 1 balancing along the lines set out in *Dagenais*.[51] What would such an analysis look like, and how would it likely be resolved? I would argue that, in the absence of compelling reasons for a general publication ban, a ban exclusively on electronic media access and publication will be unlikely to stand up to s. 1 scrutiny.

Lamer C.J. in *Dagenais* outlined respectively some of the potential salutary effects of issuing or not issuing publication bans in his rejection of the "clash model" concerning freedom of expression and trial fairness.[52] In respect to bans, the salutary effects included:

- preventing the jury from being influenced by information not presented in evidence;
- maximizing the chances that witnesses will testify because they will not be fearful of the consequences of publicity;
- protecting vulnerable witnesses;
- preserving the privacy of individuals involved in the criminal process;
- saving the financial and/or emotional costs of alternatives to publication bans (for example, delaying trials, changing venues, and challenging jurors for cause).

The salutary effects of not issuing bans included:

- maximizing the chances of individuals with relevant information hearing about a case and coming forward with new information;
- preventing perjury by placing witnesses under public scrutiny;

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51. As well, s. 146 of the *Courts of Justice Act* (*supra* note 13) restricting camera access to courtrooms remains unchallenged, and any challenge to it or comparable legislation would definitely necessitate a full section 1 balancing, given the Ontario Court of Appeal decision in *Squires*.

52. *Supra* note 34 at 882–83.

- preventing state and/or court wrongdoing by placing the criminal justice process under public scrutiny;
- reducing crime through the public expression of disapproval for crime; and
- promoting the public discussion of important issues.[53]

How will similar lists of reasons for and against bans be applied to the electronic media in a s. 1 *Charter* analysis? One must look for actual empirical evidence regarding the ability of bans on television coverage to exact the salutary effects posited. A useful starting point is to review the objections to television coverage that were persuasive at the trial level in *Squires*, and offer some more current empirical evidence than was available in 1986.

In *Squires*, Vanek J. of the Ontario Provincial court listed the following concerns raised by the four U.S. lawyers who were called as expert witnesses[54] to testify to the deleterious effects of television coverage. These included the tendency of witnesses to be distracted by the camera, to accentuate their nervousness or conversely, their posturing for the camera, the tendency of counsel to "grandstand" to the public and to promote themselves, additional "harrowing" of the accused, and the tendency of judges to become distracted or play to the camera. All this was taken to affect the jury's fact-finding ability. The jury might also be jeopardized by contamination with exposure to television, requiring more costly sequestrations.[55]

In the ten years since Vanek J.'s decision, the amount of information regarding the impact of cameras in the courtroom has increased greatly.

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53. Lepofsky has even gone further in suggesting that open reporting of the legal process provides an opportunity for "community catharsis", Lepofsky, *supra* note 33 at 12.

54. Access opponents in this case could hardly have found four lawyers with a greater interest in seeing television coverage stopped, and whose experiences with it had a more emotional flavour:

> Joel Hirschorn, a prominent defense attorney who was on the losing side of *Chandler* v. *Florida*, 101 S. Ct. 802 (1981), wherein the U.S. Supreme Court decided that television coverage does not automatically prejudice an accused's interests;
>
> Ronald Pima, the prosecuting attorney in the notorious *Big Dan* rape cases, discussed at note 67 of this article;
>
> James Shellow, another prominent criminal defense attorney, who testified on the basis of his own negative experience as a televised witness; and
>
> Charles Phillips, a criminal trial lawyer who testified regarding his experience as a witness in a televised trial regarding an incident involving the shooting of two court deputies where he was captured at gunpoint and abducted during a trial (though presumably not by a television reporter!).

55. See list of such effects in *Squires*, *supra* note 12 at 59–60; 73–79.

Many experimental programs have taken place in the United States, and have been evaluated from the point of view of effects on jurors, witnesses, lawyers and judges. In all these studies, a large majority of participant judges, lawyers, witnesses and jurors did not report the effects feared in *Squires*.[56] As of 1991, only six states and the District of Columbia did not permit any form of direct television coverage of their courts.[57]

As early as 1987, the Report of the Canadian Bar Association's Special Committee on Cameras in the Courts was able to conclude that there was no compelling evidence that a general prohibition of cameras in the courtrooms does anything to affect an accused's right to a fair trial.[58] The Report reaffirms that there is no doubt among lawyers that when this right is seriously jeopardized, it is within the judge's power to exclude *all* media. Furthermore, in certain circumstances the rights of complainants or witnesses may require some limitations on freedom of expression.[59] But in a case where no special circumstances exist, or in a non-criminal case, the report found that there is simply nothing to be gained from the exclusion of cameras *vis-à-vis* fairness.

In Appendix C of the Report, "Arguments Against Cameras in the Courtroom", objections raised are countered with arguments and evidence that cameras in the courtroom, rather than jeopardizing the process, either enhanced it or had no effect, including:

> - concerning intimidation of the average witness: in a University of Wisconsin study witnesses who were aware that they were being recorded, recalled more specific details and fewer incorrect details than non-televised witnesses;[60]

and

> - concerning the diminishment of the pool of potential jurors: an experiment at the University of Minnesota showed that a large pool of potentially

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56. See Molly Treadway Johnson, (1994), *Electronic Media Coverage of Courtroom Proceedings: Effects on Witnesses and Jurors*, Supplemental Report of the Federal Judicial Centre to the Judicial Conference Committee on Court Administration and Case Management, wherein results from 12 studies conducted in state courts are summarized. For witnesses, researchers looked at such effects as distraction, nervousness, distortion or modification of testimony, fear of harm and reluctance or unwillingness to testify with electronic media present. For jurors, effects studied included distraction, effect on deliberations or case outcome, making a case or witness seem "more important", and reluctance to serve with media present. The vast majority of those surveyed reported none of these effects.

57. James. M. Linton, "Camera Access to Courtrooms: Canadian, U.S. and Australian Experiences" (1993) 18 Cdn. J. of Communications 15 at 17.

58. Report of the Canadian Bar Association's Special Committee on Cameras in the Courts, Final Report, July 22, 1987 at 7–8.

59. *Ibid.* at 9–14.

60. *Ibid.* at 54, citing S.E. Nevas, "The Case for Cameras in the Courtroom" (1982) 6(3) Prov. Judges J. 5 at 6.

unbiased jurors remained, following intense electronic and visual media coverage of a notorious Minnesota murder trial.[61]

The Report of the Canadian Bar Association's Special Committee on Cameras in the Courts was even more explicit in its support for televising appeals. At this level there are far fewer concerns about the privacy of witnesses and others. Indeed, it was a recommendation of the Committee that there be immediate pilot projects at the appeal court level. This did not happen immediately, but such projects are now in place and operating quite successfully. The Supreme Court of Canada has been televising appeals for many years now, and provinces such as Nova Scotia have recently embarked on televised appeal hearings. The benefits of doing this are elaborated in the C.B.A. Report and the disadvantages are far fewer and less complex than in criminal trials.

Despite acceptance of television coverage at the American state court level throughout the 1980s, the more conservative U.S. federal court system remained a hold-out concerning television coverage until the report of a two-year pilot project completed in 1993. It is especially significant then, that the reports arising from that pilot project show increased acceptance and appreciation of the benefits of television coverage by the lawyers and judges who participated in the experiment.

That pilot project's summary of findings included:

- that, overall, attitudes of judges toward coverage were initially neutral and became more favourable after experience with electronic media coverage under the pilot program;[62]
- that judges and attorneys who had experience with electronic media coverage under the program generally reported little or no effect of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice;[63] and
- that most television broadcast footage was used to illustrate a reporter's narration rather than to tell the story through the words and actions of participants.[64]

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61. *Ibid.*

62. Molly Treadway Johnson, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeal*, Report of the Federal Judicial Centre to the Committee on Court Administration and Case Management of the Judicial Conference of the United States (November 4, 1993) at 2.

63. *Ibid.* Judges were surveyed as to their opinion of the extent to which electronic media distracted witnesses, made witnesses more nervous than they would otherwise be, signalled to jurors that a witness or argument was particularly important, caused lawyers to be more theatrical, caused judges to avoid unpopular decisions, and disrupted courtroom proceedings. Lawyers were surveyed as to electronic coverage's effect on distraction of witnesses and jurors, witnesses' nervousness, lawyers' theatricality and courtroom disruption.

64. *Ibid.*

The project was restricted to civil proceedings, but many of the concerns regarding jurors, witnesses, lawyers, and judges are essentially the same as those concerning the provincial court in *Squires*. When asked about their overall opinions of electronic media coverage of criminal proceedings, judges indicated more favourable attitudes in their follow-up questionnaires than in their initial questionnaires.[65] Lawyers were even more favourable in their response to the project: two thirds said they were somewhat or greatly in favour of electronic coverage.[66]

In these U.S. state and federal studies the feared effects on trial fairness simply did not materialize. In the face of the statistics produced from such studies, it will be hard to impugn electronic coverage by introducing the testimony of a few lawyers as "experts". It will be difficult to ban the electronic media on the basis of trial fairness or even decorum issues under a s. 1 *Charter* balancing, since the effects such bans are supposed to protect against simply do not, as a rule, arise. Section 1 evidentiary difficulties for those seeking to exclude cameras from courtrooms will become even more apparent as Canadian courts conclude their own experiments, which I expect will show similar results to those in the United States.

The above arguments are not to suggest that there are no problems raised by the presence of cameras in the courtrooms. There are cases in which privacy rights[67] or the rights to a fair trial might be compromised

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65. *Ibid.* at 8. District judges moved from a median response indicating "I somewhat oppose coverage" to a median response of "I have no opinion on coverage." Appellate judges moved from a median response indicating "I have no opinion on coverage" to one indicating "I somewhat favour coverage."

66. *Ibid.* at 10.

67. An issue of concern raised by the C.B.A. Special Committee on Cameras in the Courtroom is how to respect the privacy of the victim and witnesses in a criminal trial (or, even, to a lesser extent, a civil or family case). The importance of this issue was dramatized in the Massachusetts *Big Dan* rape cases (*Commonwealth* v. *Cordiero*, 519 N.E. 2d 1328 (1988); and *Commonwealth* v. *Vieira*, 519 N.E. 2d 1320 (1988)). In 1984, a woman was gang-raped on a pool table in a bar while numerous patrons looked on. The Massachusetts District Attorney's office brought charges against several men and proceeded to trial. The trial was televised, and despite assurances that the victim would not be identified, her name was broadcast by a local television station. Following completion of the trial, the victim was forced due to publicity to relocate with her daughter to another part of the state, at the state's expense.

Privacy is a matter of serious concern as vulnerable people, such as the plaintiff in a sexual abuse suit, should not have their privacy sacrificed on the altar of freedom of the press. However, the protection of these people can once again be handled by a reasonable exercise of discretion on the part of the presiding trial judge. The existing rules about the protection of the victim in a sexual assault case must still be respected. In spite of the problems in the *Big Dan* cases, the technology does allow for this kind of protection. I see no difficulty in limiting the access of the electronic media to the courtroom in order to properly respect the privacy of victims and witnesses who have been caught up in the judicial process through no fault of their own. The problems are real but they can be dealt with short of a total ban of cameras from all courtrooms.

by the presence of electronic media. This should, however, be assessed on an individual basis and the presiding judge must retain the discretion to exclude the press if she feels that it is necessary in the interests of a fair trial to do so. There has been no serious suggestion in Canada that the electronic media should have absolute, unlimited access to the courtroom. Their rights of access would have to be executed in a way that respects the rights of the accused and the other parties involved in the trial. The trial judge will and should continue to have control in this respect.

III. *Professional Hesitations: How Do Lawyers and Judges See Themselves, the Judicial Process, the Media and the Lay Public?*

Given that much of the Canadian legal profession is aware of the positive results of the U.S. experiments, why is there such tremendous hesitation on the part of many judges and lawyers to recognize a broad right of access to courtrooms by the electronic media? Perhaps it stems not so much from a concern over the rights of the accused as from fear of television's impact on the profession and the loss of control by the legal community. The American excesses in cases such as the O.J. Simpson murder trial are used to buttress such fears.[68]

Opponents to television coverage have tended to rely on vague objections based on "atmosphere", "dignity", fear of "distortion" and similarly abstract concerns, which are frequently unsupported by empirical evidence.[69] These concerns arise not so much out of considerations of

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68. As Robert J. Lind describes in "Defender of the Faith in the Midst of the Simpson Circus" (1995) Southwestern U. L. Rev. 1215:

> Although the performance of the press has become more objectionable over the years, the Simpson case has allowed for a culmination of all that is wrong with our modern media. . . . The media has violated court orders by broadcasting confidential conversations between Mr. Simpson and his attorney, interviewing attorneys in the hallway outside the courtroom and televising the identity of an alternate juror. In addition the media has rushed to judgement by relying on single sources, used digitally distorted photographs on magazine covers, compromised witnesses by paying for interviews before they testified and hounded others.

While this style of reporting is immensely regrettable, I would argue that it reflects on media establishments in the U.S. as a whole, and does not reflect special problems arising from the presence of cameras in the courtroom alone. Indeed, most of the more offensive activities took place outside the four walls of Judge Ito's courtroom, such as the hounding of one excused juror to such an extent that she required hospitalization. At the risk of sounding naive and chauvinistic, I would also say that the Canadian media have yet to show themselves in a similar feeding frenzy, and are not likely to duplicate the excesses of their U.S. colleagues in the Simpson case.

69. Some of the Ontario Court of Appeal dicta in *Squires* (*supra* note 12) are very telling in terms of how much the courts are grasping at straws to find that "good reason" to exclude the

freedom of expression or the rights of the accused, but from legal professionals' reluctance to expose themselves and their working situations to the media, particularly television.

1. *The Courtroom as Fiefdom, and the Protection of Dignity*

The courtroom is the only place where one man's or woman's word is literally law. That person is the judge. Judges have traditionally seen themselves as absolute rulers in their own courtroom domain and lawyers have tended to treat them as lords of the realm. The presence of cameras would not challenge this control in any legal way, but there may be a widespread fear that support for judicial control, and our judicial process altogether, would be undermined if put on public display.

What are the direct personal results for lawyers and especially judges of general camera presence in courtrooms at the trial level? We could see more circumspection applied to gender-based quips and pronouncements. For example, one wonders how long a judge who used the Bible to vilify female victims of spousal abuse would last given the presence of cameras in the courtroom. Without them, one such judge got away with this for years in Nova Scotia.[70] A judge's or lawyer's demeanour, alertness and personality would be exposed to a much wider section of the public than can fit in the courtroom, and because of this the presence of cameras might have a beneficial effect on the dignity of the courtroom.

The legal profession has a tendency to see itself as the appropriate final arbiter of dignity in the courtroom. There is a strong tradition in the profession of keeping everything "in house": admission standards, disciplinary proceedings, etc. This attitude has been carried over into the question of cameras in the courtroom. Lay members of the public, however, are just as qualified as lawyers to appreciate and protect dignity. Lawyers and judges should not be viewing the solution to this issue as within their exclusive domain. The profession has been making some efforts to be more open to public input, and allowing camera access would facilitate this process.

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electronic media. According to Houlden J. the reason why access to the courtroom is not simply part of the residual unregulated area of freedom of expression is the creation of the "wrong atmosphere". According to Osborne J., "merely because cameras in the courtroom have caused no reported problems cannot, in my view, be taken to support the conclusion that no harm will result" (at 420).

70. See A. Wayne MacKay, "Judicial Free Speech and Accountability: Should Judges Be Seen but not Heard?" (1993) 3 Nat. J. of Const. Law 159.

2. *Viewing Fair Trial Rights as Pre-emptive*

Despite *Dagenais* there will be great reluctance at the lower court levels to stop viewing the legal constitutional rights of an accused (enshrined in ss. 7–14 of the *Charter*) as automatically pre-emptive of other *Charter* rights, such as freedom of expression. A good example of this attitude is Judge Mercier's decision in *Squires*, quoted above. As Cory J. put it in *Edmonton Journal*, also quoted above, "[i]t is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression [and] the vital importance of the concept cannot be over-emphasized."[71] Yet, instead of a recognition of the importance of freedom of expression to societal fairness, the attitude usually taken amongst the profession is to assume that publicity will endanger the right to a fair trial, and that even the appearance of such a threat is a proper basis to exclude not only the electronic media, but press coverage altogether.[72] There is little acknowledgement that what we are really dealing with here is the interrelation of two types of guaranteed rights which have equal importance in a democratic society.

3. *Television as the Press's Poor Cousin*

The presence of cameras in the courtroom is a narrower issue than the denial of access to the press altogether. Total bans keep television as well as other reporters away from trials. Instead of such blanket approaches, we need to look specifically at the circumstances in each trial and find solutions that allow for media coverage, including television, while preserving the other rights at stake, in keeping with the approach shown in *Dagenais*.

The approach should not be different for the electronic media than for newspapers. The repugnance with which the legal profession often treats television has more to do with class bias against the electronic media and those who primarily receive their information through television, than with the actual impact of television on fairness. The character of television is relevant in that it has more power to influence people. This power scares the defenders of a more traditional courtroom.

There is an argument to be made that television is actually the least distorting of the media. For example, comparing a few seconds of video

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71. *Supra* note 23 at 1336.

72. It became evident in Ontario during the publication ban on the Homolka trial that this approach is questionable on more than empirical grounds: the accused in another related case, whom it ostensibly was protecting (Paul Teale/Bernardo), actually asked the court for the ban to be lifted in the interest of a fair trial.

broadcast during the supper hour news with screaming tabloid headlines, there is no contest as to which is more dignified. The print media have much more ability to interpret and editorialize than television broadcasters who simply show actual images of an event and have little time for comment. There is, of course, the process of selective editing and sensationalizing, but that is just as much a concern with the print media.

4. *Self-Confidence of the Legal Profession*

Much professional hesitancy about television may come down to doubts about legal professionals' own ability to handle it. To what extent will lawyers' and judges' behaviour change when faced with public outrage or lack of appreciation for the rule of law? Will all lawyers necessarily have to become grandstanders in order to best further the interests of clients? How much effort will lawyers have to put into becoming telegenic? What will happen when people see the process as it is? These are scary questions for lawyers and judges.

We should remember that these factors are already part of legal life. The use of media and publicity is a strategic decision lawyers already make regularly. Manipulation of the media through interviews and press conferences, stage whispers, looks of incredulity as a witness answers, and the lawyer's overall demeanour are already factors used to influence juries and those attending trials.[73] The C.B.A. and U.S. reports on pilot projects show that, if anything, televised lawyers became clearer and more straightforward in their arguments.

Our fears must be similar to those faced by legislators when confronted by this issue. In 1991, following the Nova Scotia Court of Appeal decision,[74] the House of Assembly installed cameras which televise only the member speaking. Media outlets are permitted to access this video-feed, although control over the cameras' operations rests with the House of Assembly. The House of Commons also is now televised. In both these instances, the fears of members never materialized. If anything, dignity levels were raised and cameras have led to a more positive experience. The legal profession can similarly rise to the challenge of a greater exposure to the judicial process.

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73. This pre-existing attitude to the manipulation of publicity on the part of some trial lawyers may be a bigger threat to "dignity" of the legal process than the presence of cameras in a courtroom. See discussion in Carol Gorney, "Model Rules and Litigation Journalism: Enough or Enough is Enough?" (1995) 67(8) N.Y. St. Bar. J. 6.

74. *Supra* note 27.

Conclusion

Given the Supreme Court of Canada's decision in *Dagenais*, there is a better climate than ever for the judicial recognition of camera access to courtrooms as part of the media's rights under the *Charter*'s freedom of the press guarantee. Decisions about camera access must be given the benefit of a full s. 1 *Charter* balancing, under the modified proportionality test prescribed for publication bans in *Dagenais*. Additionally, given the accumulating results of experiments showing few or no deleterious effects resulting from electronic coverage, it will be increasingly difficult to show that a ban on electronic coverage in the courtroom meets this test.

In general, the legal community has overstated the problems inherent in allowing cameras into the courtrooms. While there are valid arguments based upon the rights of an accused to a fair trial and the rights of other court participants to privacy, they do not explain the high degree of resistance that the legal community has exhibited to allowing the electronic media to invade our "dignified" judicial process.

There are a large number of unsubstantiated assumptions about the nature of the electronic media and the "lowest common denominator" audience to which it is assumed to appeal. There is no doubt that the electronic media are more concerned with mass appeal than the courts ever have been or should be. That does not mean that the two institutions cannot work together to create a fair justice system—one that can be viewed and understood by the general public which it is designed to serve. There is more room for co-operation than either the legal community or the electronic media are willing to admit.

The issue of cameras in the courtrooms offers the legal community an opportunity to examine some of its basic assumptions about freedom of expression, justice and what constitutes a fair judicial process. In this re-examination the legal community should make an effort to escape some of its conservative tendencies and keep an open mind about the role of the electronic media in the fair dispensation of justice. It is also an opportunity to redefine judicial dignity and decorum in a way that will make the judicial process more up-to-date and accessible to the people it is supposed to serve.